BSNC Corporation Bhd v Ganesh Kumar Bangah

HIGH COURT (KUALA LUMPUR) — SUIT NO D11–22–372 OF 2008
MARY LIM JC
28 SEPTEMBER 2009

Companies and Corporations — Directors — Breach of fiduciary duties — Whether executive director in breach of fiduciary duty — Contract between director and shareholder for purchase of shares by director — Failure of director to reveal impending mandatory general offer at higher price — Whether relationship between parties founded on pure contract — Whether fiduciary duties owed to company and not to individual shareholders of company

Companies and Corporations — Insider trading — Purchase of company shares by executive director — Impending mandatory general offer at higher price — Whether director an insider — Whether insider trading to be proven beyond reasonable doubt

Securities — Insider trading — Void transaction — Whether agreements made as a result of insider trading were void for illegality or reasons of public policy — Whether action maintainable for damages — Securities Industry Act 1983 s 89E — Capital Markets and Services Act 2007 s 188

The plaintiff owned about 9.6% of the issued shares in MOL Access Portal Bhd ('MOLACS'). Amongst the other substantial holders of MOLACS was Berjaya Capital Bhd. One of Berjaya Capital Bhd's subsidiaries was a company known as Berjaya Sompo Insurance Bhd ('Berjaya Sompo'). On 17 May 2007 the plaintiff sold all its shares to the defendant at 30 sen per share. The defendant was the chief executive officer and executive director of MOLACS. Around the time of this sale, Berjaya Sompo started to increase its shareholding of MOLACS by acquiring MOLACS shares in the open market which triggered a mandatory take over to be made. A mandatory general offer ('MGO') was made to the remaining shareholders at a price of 58 sen per share. The MGO was not made to the plaintiff as it had already sold its shares to the defendant. The defendant meanwhile sold the entire lot purchased from the plaintiff. The plaintiff felt short-changed and sued the defendant for breach of fiduciary duties purportedly owed by the defendant to the plaintiff by virtue of the position the defendant held in MOLACS. The plaintiff also claimed the defendant was an insider because he possessed price sensitive information which he used.

Held, dismissing the plaintiff's claim with costs:

(1) There was no fiduciary duty owed by the defendant to the plaintiff. The defendant's fiduciary duty was owed to MOLACS and not to the individual shareholders (see para 30).

(2) The relationship between the parties was founded on pure contract. The parties were not private naïve individuals. The plaintiff was a corporate entity choosing to divest itself of some of its assets whereas the defendant was a capable entrepreneur. Both parties kept themselves informed throughout the negotiations leading to the completion of the sale of the shares. Therefore, it was difficult to perceive the platform upon which the action was founded. On this ground alone, the action must fail (see para 32).

(3) There was no direct evidence on the allegation that the defendant was an insider. All that was offered were inferences which were grossly insufficient. Section 89E of the Securities Industry Act 1983 and s 188 of the Capital Markets and Services Act 2007 prohibit the acquisition of any benefit where the person is an insider. This must mean that any agreement for the acquisition of shares in such circumstances must be void for illegality or reasons of public policy. The burden of proof must therefore be the higher burden of beyond reasonable doubt rather than one on a balance of probabilities (see para 36).

(4) In the event there is tainting of the contract for violations of s 188 of Act 671, the effect must be to find the contract void and for parties to return any benefits received. The consequence of a void contract cannot be to allow it as a basis for claiming damage in the form of more monies that could be made. Yet, the plaintiff was seeking to be allowed to keep the monies made under the contract challenged as invalid for reasons of illegality or being contrary to public policy and be entitled to some more (see para 37).

(5) There was nothing in the notification shareholders offering the MGO that suggested the involvement of the defendant. The MGO was triggered by the purchases of Berjaya Sompo and not by the defendant. The defendant's position as CEO, ED and shareholder did not mean that there was knowledge of the impending MGO or that such knowledge could be imputed (see paras 38, 41–42).

[Bahasa Malaysia summary

Plaintif memiliki 9.6% saham diterbitkan dalam MOL Access Portal Bhd ('MOLACS'). Antara pemegang besar MOLACS ialah Berjaya Capital Bhd. Satu daripada anak syarikat Berjaya Capital Bhd merupakan sebuah syarikat dikenali sebagai Berjaya Sompo Insurance Bhd ('Berjaya Sompo'). Pada 17

Mei 2007 plaintif menjual semua sahamnya kepada defendan pada harga 30 sen untuk satu unit saham. Defendan merupakan ketua pegawai eksekutif dan pengarah eksekutif MOLACS. Semasa penjualan ini, Berjaya Sompo mula meningkatkan pegangan sahamnya dalam MOLACS dengan mendapatkan saham MOLACS di pasaran terbuka yang mencetuskan pengambilalihan mandatori dijalankan. Tawaran umum mandatori ('TUM') ditawarkan kepada pemegang saham yang kekal pada harga 58 sen untuk satu unit saham. TUM tidak ditawarkan kepada plaintif memandangkan ia telahpun menjual sahamnya kepada defendan. Sementara itu defendan menjual keseluruhan lot yang dibeli daripada plaintif. Plaintif merasakan tidak dibayar secukupnya dan menyaman defendan kerana melanggar kewajipan-kewajipan fidusiari oleh defendan kepada plaintif disebabkan kedudukan yang disandang oleh defendan dalam MOLACS. Plaintif juga mendakwa bahawa defendan merupakan orang dalam kerana dia mempunyai maklumat harga sulit yang digunakannya.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Tidak terdapat kewajipan fidusiari oleh defendan kepada plaintif. Kewajipan fidusiari defendan hanyalah kepada MOLACS dan bukannya kepada pemegang-pemegang saham individu (lihat perenggan 30).

(2) Hubungan di antara pihak-pihak bersandarkan kontrak semata-mata. Pihak-pihak bukannya individu-individu persendirian yang naif. Plaintif merupakan entiti korporat yang memilih untuk melepaskan sebahagian asetnya manakala defendan merupakan usahawan berkebolehan. Kedua-dua pihak memastikan mereka dimaklumkan sepanjang rundingan sehinggalah jualan-jualan saham tersebut diselesaikan. Oleh itu, adalah sukar untuk menerima asas di mana tindakan dimulakan. Berdasarkan alasan ini sahaja, tindakan tersebut seharusnya gagal (lihat perenggan 32).

(3) Tidak terdapat keterangan secara langsung mengenai dakwaan bahawa defendan merupakan orang dalam. Semua yang dinyatakan merupakan inferens-inferens yang mencukupi sama sekali. Seksyen 89E Akta Perindustrian Sekuriti 1983 dan s 188 Akta Pasaran Modal dan Perkhidmatan 2007 melarang pemerolehan faedah di mana seseorang merupakan orang dalam. Ini bermaksud bahawa mana-mana perjanjian untuk pemerolehan saham dalam keadaan-keadaan tersebut adalah tidak sah kerana menyalahi undang-undang atau alasan-alasan polisi awam. Oleh itu, beban membuktikan mestilah beban kukuh tanpa keraguan yang munasabah daripada imbangan kebarangkalian (lihat perenggan 36).

(4) Dalam keadaan di mana terdapat kecacatan kontrak kerana pelanggaran s 188 Akta 671, kesannya kepada kontrak adalah tidak sah dan pihak-pihak perlu memulangkan faedah-faedah yang diterima. Akibat kontrak yang tidak sah tidak membenarkannya menjadi asas untuk tuntutan ganti rugi dalam bentuk wang dibuat. Namun begitu, plaintif yang menuntut dibenarkan untuk menyimpan wang yang didapati dalam kontrak dicabar sebagai tidak sah bagi alasan-alasan kepenyalahan undang-undang atau bercanggah dengan polisi awam dan berhak kepada sebahagian lagi (lihat perenggan 37).

(5) Tidak terdapat apa-apa dalam makluman pemegang-pemegang saham yang ditawarkan TUM yang membayangkan penglibatan defendan. TUM dicetuskan oleh pembelian Berjaya Sompo dan bukannya oleh defendan. Kedudukan defendan sebagai CEO, ED dan pemegang saham tidak bermaksud terdapat pengetahuan mengenai TUM akan berlaku atau pengetahuan mengenainya boleh dijangkakan (lihat perenggan 28, 41–42).]

Notes

For cases on breach of fiduciary duties, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 197–203.

For cases on insider trading generally under companies and corporations, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 386–387.

For cases on insider trading generally under securities, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 906–910.

Legislation referred to

Capital Markets and Services Act 2007 s 188
Companies Act 1965 s 132(1), (2)
Contracts Act 1950 s 66
Malaysian Code on Takeovers and Mergers 1988 Part II
Practice Note 2.3
Securities Commission Act 1993
Securities Industry Act 1983 s 89E (repealed by Capital Markets and Services Act 2007)

S Periasamy (M Kumar with him) (Maha & Peri) for the plaintiff.
LH Chua (LH Chua) for the defendant.

Mary Lim JC:

THE SALE AND PURCHASE OF SHARES IN MOLACS

[1] MOL Access Portal Bhd ('MOLACS') was first incorporated as a private limited company on 9 February 2000. After a change of name, it became a public limited company on 29 April 2002. It was then listed on

MESDAQ Market of Bursa Malaysia Securities Bhd on 22 December 2003. That listing raised RM6m for MOLACS. Through a private placement, the plaintiff bought 4.8 million shares in MOLACS at RM0.395 sen per share on 2 September 2005. On 20 October 2005, there was a bonus issue of new shares. The plaintiff received 3.6 million new shares bringing its shareholding in MOLACS to 8.4 million shares. This amount represented 9.6% of the issued shares.

[2] The other substantial holders of MOLACS shares were a group of companies controlled by Tan Sri Vincent Tan Chee Yioun ('TSVT'). That group comprised Berjaya Corporation Bhd, Berjaya Capital Bhd and MOL.com Bhd ('MOL'). MOL is the holding company of MOLACS. One of Berjaya Capital Bhd's subsidiaries was a company known as Berjaya Sompo Insurance Bhd ('Berjaya Sompo').

[3] The plaintiff decided to sell its whole lot of shares. The plaintiff sold them to the defendant. The sale was concluded on 17 May 2007 in what is known as a married and off-market transaction. The price agreed was 30 sen per share and the total amount paid was RM2,520,000. The defendant was at the material time and still is the chief executive officer and executive director of MOLACS. The defendant also owned shares directly and indirectly in MOLACS. Apart from purchasing from the plaintiff, the defendant made similar purchases in the open market on different dates and at various prices.

[4] Around the time of the defendant's purchases, Berjaya Sompo also started to increase its shareholding of MOLACS by acquiring MOLACS shares in the open market. TSVT, MOL and Berjaya Sompo were entities within the meaning of 'parties acting in concert'. This fact and Berjaya Sompo's increased shareholding of MOLACS triggered a mandatory take over to be made.

[5] TSVT decided to nominate Hotel Resort Enterprise Sdn Bhd ('HRE') to undertake and make the mandatory general offer ('MGO') to the remaining shareholders. HRE became the offeror under the MGO. The exercise was carried out and a price of 58 sen per share was offered. The MGO was not made to the plaintiff as it had already sold its shares to the defendant. The defendant, on the other hand sold the entire lot purchased from the plaintiff. With this the defendant was said to have recovered a substantial part of its expenses incurred in purchasing the plaintiff's lot whilst still retaining his position as chief executive officer ('CEO') and executive director ('ED') of MOLACS. The plaintiff felt short changed and sued.

THE CLAIM AND THE DEFENCE

[6] The cause of action is for breach of fiduciary duties purportedly owed by the defendant to the plaintiff by virtue of the defendant's position as CEO and ED of MOLACS. The relief claimed is the amount the plaintiff would have made had the MGO been made to the plaintiff.

[7] The plaintiff claimed the defendant's conduct and the circumstances surrounding the defendant's purchase of the MOLACS shares showed that the defendant knew or ought to have known that a MGO would be triggered. The purchase was really to preempt and prevent the plaintiff from selling its lot of shares at 58 sen per share. The fact that the defendant sold only his lot purchased from the plaintiff, was able to recover his capital outlay and still retained his position as CEO and ED was seen as evidence of a larger corporate scheme to take MOLACS private and delist it from Bursa Malaysia. It was alleged the defendant played a crucial part in this scheme. It was further alleged that these acts of the defendant violated the Companies Act 1965, Securities Industry Act 1983, Securities Commission Act 1993 and the listing requirements of Bursa Malaysia Securities Bhd for MASDAQ marketing.

[8] In defence, the defendant's case is primarily one of ignorance and denial of any information relating to the MGO and the presence of any scheme, denial of fiduciary duty owed to the plaintiff and denial of violation of any laws, regulations or listing requirements. The sale and purchase of the MOLACS shares was said to be on the basis of a willing buyer willing seller.

THE ISSUE

[9] Shorn of all protractions, the case revolves really around one issue — whether the defendant knew of the impending MGO at the time of the purchase of the shares. If the defendant knew or ought to have known of this impending MGO, was he under a duty to inform the plaintiff or was he under a duty not to take advantage of that knowledge.

SUBMISSIONS

[10] It is the plaintiff's case that the defendant had the requisite knowledge at the material time or that he ought to have known for various reasons. There is no direct evidence. Instead, the plaintiff invited the court to look at the relevant facts and circumstances including the conduct of the defendant at the material time in order to draw the necessary conclusion.

[11] According to Mr Periasamy, learned counsel for the plaintiff, a critical examination and evaluation of all the circumstances and facts as well as the surreptitious and stealthy conduct of the defendant support the plaintiff's claim that the defendant was fully aware of the impending MGO. The following were submitted as the relevant facts and evidence of such conduct.

[12] First, the position of the defendant in MOLACS. Being a shareholder, director, ED and CEO with an impressive corporate background, it was suggested that the defendant was a person well aware of his acts and the consequences of those acts. Minutes of board meetings were tendered to show active participation of the defendant as opposed to being a mere employee reporting to the board. He was a person who led the board and managed MOLACS.

[13] In the matter of conduct, several events were examined and suggested as evidence of prior knowledge of the impending MGO. Top of the list of events was the information concerning the impending sale of the plaintiff's strategic block of shares. The plaintiff said that that information was disclosed to the defendant in his capacity as CEO of MOLACS. It was therefore incumbent on the defendant to in turn disclose that information to MOLACS' board meetings. Mr Jamaluddin Nor Mohamad ('PW1'), the plaintiff's nominee to MOLACS' board of directors testified that there was no such disclosure at the material time. Non-disclosure for a period of 49 days was said to amount to evidence of willfulness on the part of the defendant.

[14] The plaintiff next accused the defendant of misleading the plaintiff into believing that there was a party interested in buying its shares if the price was reduced to 30 sen per share. This was improper and dishonourable because the plaintiff claimed there was in fact no other interested parties save for the defendant. Because of these representations of the defendant, the plaintiff was lulled into not looking for alternative buyers and was further induced into agreeing to the reduction in price.

[15] Getting Lee Kok Chuan ('Lee'), a non-independent and non-executive director of MOLACS to sign the letter of acceptance of 16 May 2007 was also seen as a deliberate decision. It was suggested that since Lee held positions in Berjaya Capital Bhd, he would therefore have known of the impending MGO. In turn, the defendant similarly would have known.

[16] Mr Periasamy further submitted that it was neither plausible nor acceptable for the defendant to claim that the purchases of the MOLACS shares by Berjaya Sompo was accidental as told to him by the fund managers. According to him, the defendant had no reason to check with the fund

managers except if he was involved in the securities investment activities of Berjaya Sompo or the investment policies of the Berjaya Group of Companies. The court was asked to draw an adverse inference against the defendant for not calling witnesses from either the fund managers or Berjaya Sompo for corroboration.

[17] In response, Mr Chua, learned counsel for the defendant first took the position that the defendant owed no fiduciary duty to the plaintiff. Any duty owed would be to the MOLACS and not to the plaintiff, although the plaintiff may have been a shareholder at the material time. This is quite apart from the stand maintained — that the defendant was ignorant of any impending MGO or being part of a corporate scheme. He further denied having taken advantage of the conditions. The sale was initiated at the behest of the plaintiff. It wanted to sell in order to raise monies for its new businesses. The evidence further showed that the plaintiff was not in the least concerned as to the identity of the purchaser of the shares. Its concern was only as to price. Once that was sorted out the deal sped to its conclusion.

DETERMINATION

[18] It would be best to chronologically set out the material events as presented by both parties through the documents found in bundle 'A' in order to properly determine the issue identified. When so presented, the facts can then be seen in their context and be properly evaluated.

[19] It all started with the plaintiff's board of directors' meeting on 27 February 2007. Around this time, the plaintiff decided to offer for sale its shares in MOLACS subject to certain terms (at p 9 of bundle A). From the evidence adduced, it appears that this decision was in order for the plaintiff to raise money for its new businesses.

[20] By letter dated 13 March 2007, the plaintiff communicated its decision to the defendant as CEO of the MOLACS (at p 9 of bundle A). From this, it shows that it was the plaintiff who approached the defendant about the sale and not the other way round. In this letter, the plaintiff offers for sale its shares subject to terms.

[21] Using MOLACS' letterhead and writing in his capacity as CEO of MOLACS, the defendant replied the plaintiff on 30 April 2007 (at p 10 of bundle A). In this letter, a meeting between the parties in the plaintiff's office is referred to. However, no further details are provided. In this letter too, the defendant informed of a potential buyer for the plaintiff's shares and the potential buyer's counter-terms.

A **[22]** On 8 August 2007, the defendant's counter offer as found in letter of 30 April 2007 was tabled at the plaintiff's board of directors' meeting. The board agreed to the defendant's offer subject to its counter-terms (at p 11 of bundle A). The plaintiff communicated its board's decision to the defendant on 10 May 2007 (at p 11 of bundle A).

B

[23] On 15 May 2007, a notification of the defendant's intention to deal in the securities of MOLACS during the closed period was issued. At this date, the defendant held a total of 4.17% shareholding of MOLACS (at p 24 of bundle A).

C

[24] On 16 May 2007, Lee accepted the plaintiff's counter offer set out in its letter dated 10 May 2007. In this letter, details of the identity of the buyer is provided — the defendant was the buyer (at p 25 of bundle A). The D defendant himself followed up with an acceptance letter of the same date as seen at p 26 of bundle A. On the same day, the plaintiff authorised its merchant bankers, AmanahRaya-JMF Asset Management Sdn Bhd to sell to the defendant on the terms as agreed between the parties (at p 27 of bundle A).

E

[25] On 17 May 2007, another announcement was made of the defendant's purchase. With the purchase of the plaintiff's block of shares, the defendant's shareholding in MOLACS now stood at 9.08% (at p 28 of bundle A). At the same time and later on 23 May 2007, the defendant made F two purchases of MOLACS shares in the open market at a price higher than that transacted with the plaintiff (at pp 28 and 29 of bundle A).

[26] Between 28 May 2007 to 11 June 2007, Berjaya Sompo acquired a G total of 2,996,000 MOLACS shares in the open market. With this purchase, the parties acting in concert held 43.85% of MOLACS shares. A notice to take over was therefore triggered.

[27] On 13 June 2007, TSVT requested a suspension of trading of H MOLACS shares so that the exercise of a MGO could be carried out. On the same date, the trading in MOLACS was suspended (at p 31 of bundle A). On the same day too, and pursuant to practice note 2.3 and Part II of the Malaysian Code on Takeovers and Mergers 1988, a formal notice of conditional mandatory take-over offer was served by HRE's merchant I bankers to acquire all the remaining shares. The price under the MGO was 58 sen per share. On 9 July 2007, the conditional offer became unconditional when HRE and the parties acting in concert received more than 50% of the voting shares in MOLACS. The details of the MGO can be found at pp 33–44 of bundle A.

[28] The MGO was also offered to the defendant who now held 11.18% of the paid-up share capital of MOLACS. However, an arrangement was reached between the defendant and HRE where the defendant gave 'an irrevocable undertaking not to accept the offer by the Offeror under the MGO save for 4.2m shares for which he may accept the offer' (at p 43 of bundle A). With effect from 25 February 2008, MOLACS went private and was delisted from Bursa Malaysia.

[29] The first order must be to determine whether there is a fiduciary duty owed by the defendant to the plaintiff. This claim is not for damage due to a breach of contract or even for misrepresentation. In order to therefore succeed, the plaintiff must establish the existence of a relationship where such duty can be said to exist in law and on the facts.

[30] From evidence, I do not find this relationship established. In law, the defendant's fiduciary duty is owed to MOLACS and not to the individual shareholders, including the plaintiff. Section 132(1) and (2) of the Companies Act 1960 states:

> (1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.
>
> (2) An officer or agent of a company … shall not make improper is use of any information acquired by virtue of his position as an officer or agent or of the company … to gain directly or indirectly an advantage for himself or for any other person or to cause detriment to the company.
>
> (3) An officer or agent … who commits a breach of this section shall be —
>
> (a) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach; and
>
> (b) …

[31] These several provisions show that the defendant's duty is owed to the company and not to the plaintiff. As a director of MOLACS, the defendant owes a fiduciary duty to act in the interests and for the benefit of 'the company (and the company alone) and it is enforceable in the same way as any other fiduciary duty owed to a company by its directors …' – see *Halsbury's Laws of England* (4th Ed, 1996 Reissue) Vol 7(1) at para 582 on 'Position of directors generally'. It is equally well established that the defendant as a director or CEO owes no fiduciary duty towards any individual shareholder in the company — see *Halsbury's Laws of England* Vol

7(2) para 1193. This is not to say that there can never be such duty owed to shareholders. However, that would be in exceptional circumstances of which the instant cannot be so regarded. In this transaction, I cannot find any evidence of the defendant having acted to the detriment of MOLACS. The concluded price of the shares was at a price prevailing in the open market. In as much as the prices may increase, and in view of the volume of shares involved, the price may just as likely dip.

[32] The relationship between the parties is in fact founded on pure contract. The parties are not private naïve individuals. The plaintiff is a corporate entity choosing to divest itself of some of its assets in order to divest into other investments or new businesses whereas the defendant is a capable entrepreneur who made corporate history by becoming the youngest CEO when he was only 27 years of age. Both parties were informed and kept themselves informed throughout the negotiations leading to the completion of sale and purchase of the block of shares. In fact, the negotiations appear to have spanned some three months. Therefore, it is difficult to perceive the platform upon which the action is founded and sustained. On this ground alone, the action must fail.

[33] The plaintiff further claimed the defendant was an officer and an insider. The Companies Act 1965 does not define the term 'insider'. However, s 89E of the Securities Industry Act 1983 (Act 280) prohibits certain conduct of persons in possession of inside information —

> 89E Prohibited conduct of person in possession of inside information
>
> (1) A person is an 'insider' if that person —
>
> (a) possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities; and
>
> (b) knows or ought reasonably to know that the information is not generally available.
>
> (2) An insider shall not, whether as principal or agent, in respect of any securities to which information in subsection (1) relates —
>
> (a) acquire or dispose of, or enter into an agreement for or with a view to the acquisition or disposal of such securities; or
>
> (b) procure, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities.
>
> (3) ...

(4) ...

[34] The Securities Industry Act 1983 (Act 280) has since been repealed and replaced by the Capital Markets and Services Act 2007 (Act 671). Section 89E is nevertheless maintained in s 188. The wording is in pari materia.

[35] Looking at the case before me, and as I understand it, it is the submission of the plaintiff that the defendant was an insider because he possessed certain price sensitive information which he used despite being specifically prohibited. The information in question is that relating to the MGO. A reasonable person would expect that information to have a material effect on the price of the MOLACS shares. That information was not generally available and the defendant was well aware of this. He was not allowed to use that information for any direct or indirect acquisition or disposal of MOLACS shares. But, he did. In so doing, he contravened ss 89E or 188, as the case may be.

[36] There is no direct evidence on this allegation before me. All that is offered are inferences. To me, that is grossly insufficient for several reasons. In the first place, from a reading of s 89E of the Securities Industry Act 1983 and s 188 of Capital Markets and Services Act 2007 (Act 671), it would appear that these provisions prohibit the acquisition of any benefit where the person is an insider. This to my mind must mean that any agreement for the acquisition of any shares in such circumstances must be void for illegality or reasons of public policy. The burden of proof must therefore be the higher burden of beyond reasonable doubt rather than one on a balance of probabilities.

[37] I would also go so far as to observe that in the event there is tainting of the contract for violations of s 188 of Act 671, the effect must be to find the contract void and for parties to return any benefits received. Section 66 of the Contracts Act 1950 is clear on this. Surely the consequence of a void contract cannot be to allow it as a basis for claiming damage in the form of more monies that could be made. Yet, that is precisely what the plaintiff is seeking in this case, to be allowed to keep the monies made under a contract challenged as invalid for reasons of illegality or being contrary to public policy and be entitled to some more.

[38] Secondly, from the chronology of events, it can be seen that an MGO is triggered by a certain level of purchase. The background leading to the MGO is as explained in the notice to shareholders offering the MGO at pp 36 and 37 of bundle A. There is nothing in that notification that suggests the involvement of the defendant and for which it may be imputed the necessary

knowledge at the relevant time. On the contrary, the notification which remained unchallenged and good reveals that the MGO was triggered by the purchases of Berjaya Sompo and not by the defendant. Berjaya Sompo is not a party to this action. Berjaya Sompo had also made its purchases from the open market, through Bursa Malaysia Securities Bhd via contract notes. To impute acts of Berjaya Sompo to the defendant through the tenuous connection of Lee and the structural ownership of the various companies involved is insufficient, improper and unsafe.

[39] Further, section 7 of the notification (at p 43 of bundle A) has identified the persons who are deemed to be parties acting in concert with the offeror, namely TSVT, MOL and BSI ('Berjaya Sompo'). The defendant is not one of those persons. It would be wrong to go beyond that.

[40] In the absence of concrete evidence of knowledge or facts where it can only be the irresistible or irrefutable conclusion that the defendant knew or ought to have known of the impending MGO, it would be wrong for the court to draw conclusions colouring what was otherwise a proper deal at the material time.

[41] It was suggested that in failing to table the plaintiff's offer to sell its strategic block of shares and thereby failing to secure the necessary authorisation of MOLACS' board of directors coupled with procuring Lee to sign the material letter to buy the plaintiff's block of shares are all evidence of willfulness on the part of the defendant indicative of knowledge of the impending MGO. In this regard, there is no requirement for the defendant to always procure the mandate of MOLACS' board of directors before acting. In fact, there is no evidence to suggest that the offer was in the first place specifically intended for MOLACS and the defendant's only function or role was to take the offer back to the board for consideration. Neither of the plaintiff's two witnesses, in particular PW2 who negotiated with the defendant at all time testified to this effect. If that be the case, I would have expected the plaintiff to react immediately when the offer was accepted by the defendant personally with some counter offer terms.

[42] The position of the defendant and even the role played by Lee are not per se evidence of insidious or improper conduct to amount to the suggestions as put forth by the plaintiff. The defendant's position as CEO, ED and shareholder cannot necessarily and do not in the facts of the case, mean that there is knowledge of the impending MGO or there can be imputed that knowledge. I must add that it has not even been established let alone shown that Lee had any knowledge of the impending MGO to start with. To allow importation onwards to another party like the defendant in such circumstances would be highly unsafe and should not be allowed.

[43] Some issue was made on the identity of the purchaser of the plaintiff's shares. The plaintiff suggested that the defendant kept his identity as the potential purchaser till after the price had been concluded and it was too late for the plaintiff to back out. A

[44] It is difficult for me to accept any suggestion of naivety on the part of the plaintiff. As I said earlier, we are looking at above board negotiations for a married off-market transaction. In such circumstances, I would have expected the parties to have taken the necessary precautions and made the appropriate inquiries before taking any step towards the conclusion of the transaction. After all, the amount under discussion is by no means small change even for a company like the plaintiff. B C

[45] At the trial, Mohd Ariffin bin Marzuki ('PW2'), the CEO of the plaintiff at the material time and still is the CEO testified for the plaintiff. He was the person who negotiated with the defendant. He was a competent witness and competent in his portfolio too. If the identity of the purchaser was crucial to the transaction or of greater significance, if the defendant being the purchaser was a material or relevant factor, I would have expected some mention or evidence of this in the records. There were plenty of opportunities for the plaintiff to simply ask for the identity of the potential purchaser, be it at the numerous meetings or correspondence. D E

[46] As a corporate sole where all its decisions are collegiate it was always open to the plaintiff to make any inquiries it considered necessary and appropriate in order to secure the best deal for itself. This must surely extend to the matter of the identity of the buyer of its shares. In fact, I would have thought that fact rather important to identify and to do so early since a substantial amount of shares is being transacted. Surely a prudent seller would want to know who the buyer of its shares is in order to ensure payment is secure. F G

[47] It was also open to the plaintiff to sell its shares in the open market but it did not for whatever reason it may have had which is immaterial for this case. The plaintiff could have rejected the defendant's offer. But again, it did not. After laying down its own counter-terms, the plaintiff merely reminded that the sale needed to obtain the sanction of the authorities. If the shares are a strategic block, then it too ought to have been alert to the possibilities of the trigger event of an MGO. Actually, because of the size of the shares, it was in the interest of the plaintiff to sell in an off-market married deal as the best price could then be secured as was the case here. H I

[48] In fact, I would go so far as to say that if the identity of the purchaser of the plaintiff's shares were critical and there was real and bona fide belief

A that the defendant had the relevant knowledge at the material time, I would have expected the plaintiff to immediate lodge a protest with all relevant persons and authorities, in particular the defendant, Bursa Malaysia and Securities Commission. There was none. This appears more to quite an afterthought. The contract of sale here is evident as one between a willing B buyer and a willing seller.

[49] I also do not find any evidence of pressurising or luring by the defendant. Neither do I find evidence of any play with time by any party so as to infer knowledge of the impending MGO. What I do find is that the C issue of the identity of the buyer was neither important nor relevant to the negotiations. It was of no concern to the plaintiff. All the plaintiff was interested in at the material time was to obtain the best price for its shares. And it did. It made a profit on its sale. That was paramount as it would allow the plaintiff to proceed with its objective of divesting into other businesses. D To my mind, the plaintiff was not concerned as long as the deal could be effectively and speedily concluded on cash terms. The evidence in fact showed the plaintiff instructing its merchant bankers on the same date to conclude the sale.

E

[50] The defendant has testified and provided fair and reasonable explanations for his several purchases of MOLACS shares and it is not the court's function to examine his choice of investments. It is his business decision to buy and to sell, how much and when. So long as there are no violations of the relevant laws, the related transactions must be respected as F parties' choices. Observing the conduct of the defendant, I find him conscious of the implications of his conduct each time he made his purchases of the shares. There was appropriate and timely disclosure to the authorities at the relevant times. I do not find his conduct surreptitious or stealthy as alleged but proper and in accord given the circumstances and development of G events.

[51] It is not necessary for me to address the quantum of loss claimed. In any event, I do not find any loss. The plaintiff's lot of shares may not H necessarily have been purchased by the offeror of the MGO. The claim is therefore highly speculative and must be disallowed. In the circumstances, the plaintiff's claim is dismissed with costs agreed at RM75,000.

Plaintiff's claim dismissed with costs.

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Reported by Kanesh Sundrum